

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP245-CR

Cir. Ct. No. 2003CM189

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRENT R. REED,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ The State appeals from an order granting Brent Reed's motion to suppress evidence obtained from a traffic investigation after the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

State violated the court's sequestration order by sending its witness a transcript of a closed motion hearing. The trial court concluded that while the State's actions were unintentional, the error exposed the defendant's trial strategy to the State's key witness and impacted Reed's ability to receive a fair trial. The State contends that the trial court erroneously exercised its discretion because a sequestration order violation does not warrant suppressing all evidence obtained during the traffic stop. Because we conclude that the trial court properly addressed the relevant facts and reached a reasonable decision, we affirm.

Background

¶2 This case arose out of a traffic investigation late one Saturday night in March 2003. Highway patrol Officer Cory Otto passed a vehicle parked alongside the highway and saw a person in the driver's seat. Deputy Otto turned around and pulled up behind the vehicle. By that time, he did not see anyone in the driver's seat, but saw Reed sitting in the passenger's seat. *Id.* Deputy Otto observed that Reed's eyes were bloodshot and his speech was slurred. *Id.* Reed immediately told Deputy Otto that he had been drinking, so his friend, John Triller, was the one driving. *Id.* He claimed that Triller had pulled over because of an argument and then walked away. *Id.*

¶3 Deputy Otto called for backup and Officer Wohlfert responded. Wohlfert searched for Triller but was unable to find him. *Id.* Deputy Otto asked Reed to exit his vehicle and perform field sobriety tests. *Id.* Reed refused and Deputy Otto placed him under arrest. The officers took Reed to the hospital where they read him the informing the accused form and he agreed to a blood test. *Id.* Reed was charged with obstructing an officer and operating a vehicle while under

the influence of an intoxicant and with a prohibited alcohol concentration, third offense.

¶4 Reed filed two suppression motions challenging the constitutionality of his stop and seeking suppression of statements the police obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Goodchild v. Burke*, 27 Wis. 2d 244 (1965). In August 2005, at a hearing on the motions, the State's first witness was Deputy Otto. During cross-examination, Reed's attorney asked Deputy Otto why he had called for backup the night he arrested Reed. The State objected as to relevance. Reed's attorney asked to make an offer of proof outside the presence of Deputy Otto. The court granted his request. *Id.* Once Deputy Otto left the courtroom, Reed's attorney stated that he believed Deputy Otto arrested Reed earlier than he testified based on the totality of the circumstances. He further explained that he wanted to elicit Deputy Otto's intentions in calling for backup to show that Reed could have objectively believed he was under arrest before the officer claimed. *Id.* Reed's attorney outlined his strategy that if Reed was in custody when Deputy Otto approached him, anything Reed said to the officers prior to a *Miranda* warning could be suppressed on Fifth Amendment grounds. The trial court ruled that Deputy Otto's reason for calling backup was relevant evidence and allowed Reed's attorney to continue with this inquiry.

¶5 When court reconvened, Deputy Otto testified that he called for assistance for safety reasons. At that point, the court stated that it needed to take a short recess to address another case. Prior to the break, the court clarified that its order sequestering Deputy Otto also restricted the State from communicating with Deputy Otto about what was said while he was outside the courtroom. After the break, the court adjourned the hearing because of court congestion.

¶6 The hearing was rescheduled for October 2005. Before the hearing began, the assistant district attorney informed Reed’s counsel and the court that he had obtained the transcript from the August hearing (including the portion when Deputy Otto was sequestered) and sent it to Deputy Otto to review. The assistant district attorney also revealed that he had called Deputy Otto to ask whether he read the entire transcript. Deputy Otto confirmed that he had, stating “I thought they were going there anyway.” Reed objected, asserting that the sequestration violation was an “incurable error by the State” that prejudiced Reed’s case. After both parties briefed the issue, the trial court agreed with Reed and granted his motion to suppress all statements made to the officers and the evidence obtained from the stop.

Analysis

¶7 One purpose of a sequestration order is to ensure a fair trial. *Nyberg v. State*, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977), *overruled on other grounds*, *State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). When a witness or party violates a sequestration order, the decision of whether to allow the witness to testify is “generally left to the sound discretion of the trial court.” *Id.* at 409-10. We review a trial court’s decision to see whether discretion was in fact exercised, and if so, whether the result was reasonable and based on a rational mental process. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981); *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). We have recognized that this decision involves a two-part inquiry: “a witness who has violated a sequestration order should not be allowed to testify where the defendant has been prejudiced by this violation and the party calling the witness was a guilty participant in the violation.” *State v. Bembenek*, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983); *see also Nyberg*, 75 Wis. 2d at 409.

¶8 Based on the facts of this case and the trial court's discussion of its ruling, we are satisfied that the trial court did not erroneously exercise its discretion by granting Reed's suppression motion. First, it is clear that the assistant district attorney violated the sequestration order by sending Deputy Otto a transcript of the closed proceeding and later calling him to discuss the transcript. Second, the State's violation prejudiced Reed's defense because it exposed Reed's trial strategy to the State's key witness, an error the trial court concluded could not be undone.

¶9 The State argues that the court could have imposed alternative sanctions short of granting the suppression motion. While these alternatives may have been reasonable, our standard of review directs our inquiry to whether the trial court's result was an erroneous exercise of discretion. We do not consider what our answer would be were we to decide the issue de novo.

¶10 We conclude that the trial court did not erroneously exercise its discretion because it considered the relevant facts and reached a reasonable decision. The court recognized that the significance of Deputy Otto's testimony was not necessarily dispositive. However, there was no way of knowing how the State's actions would have impacted Deputy Otto's testimony, and therefore Reed's ability to receive a fair hearing was irreparably diminished. *Id.* Thus, the court concluded that it needed to impose a sanction for violating the sequestration order. The trial court said:

There is no way of undoing what has been done. There is no way of knowing precisely what effect the knowledge that the officer now has might have on what testimony would be contemplated.

In light of that, the court considers that the only appropriate remedy at this stage ... is to grant the motion for suppression.

¶11 The success of Reed's suppression motion depended on determining the moment when Reed was under arrest for Fourth Amendment purposes. Deputy Otto's testimony was critical. The trial court's ruling effectively prohibited Deputy Otto from testifying. Because the trial court properly exercised its discretion, we affirm the court's decision to grant Reed's suppression motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

